certification form present evidence documenting the basis for their determination and that operators are provided an adequate opportunity to challenge that determination. Operators must be afforded this opportunity to dispute a finding of the absence of effective competition prior to the onset of rate regulation.

Since a finding of the absence of "effective competition" is a jurisdictional prerequisite to assertion of rate regulatory power, the Commission's review of this determination, if challenged, cannot -- and need not -- be accomplished in the 30 day period established in the Act for reviewing franchising authority certifications. Thus, we propose that if a finding of no effective competition is challenged by an operator within 30 days of the filing of a certification request, the 30 day statutory review period not begin to run from the filing of the certification. Operators instead should be allowed 30 days from the date an operator receives notice that a certification request has been filed at the Commission in which to obtain and present relevant evidence to demonstrate that "effective competition" does in fact exist in its franchise area.[65/] Only after the

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65/ We also agree with the Commission's tentative conclusion that effective competition determinations should be made on a franchise-area basis. Indeed, the language of the "effective competition" definition appears to admit no other interpretation. Section 623(1)(defining "effective competition" by reference to the "franchise area.")

We fail to understand, however, why the Commission proposes to determine whether effective competition exists on a system-wide basis, for purposes of its own rate regulation of "cable programming services." The FCC's proposal appears

(Footnote continues on next page)

Commission reviews this evidence and determines that effective competition is lacking should the 30 day period begin to run.

Furthermore, the Commission must ensure that operators have access to information relevant to determining whether "effective competition" as defined in the Act exists. Whether a competing multichannel video programming distributor offers comparable video programming to at least 50 percent of the households in the franchise area and has subscribers exceeding 15 percent of those households may not be readily determinable by the franchising authority or the cable system. In order to remedy this situation, a competing multichannel video programming distributor must provide, upon request, service availability and penetration estimates to a competing cable system, franchising authority or the FCC.[66/] Otherwise, the effective competition test will represent little more than a sword for a competitor to the cable system to stymie an operator's ability to compete.

(Footnote continued)
based on the erroneous assumption that rates must be uniform throughout the system. But, as we discuss later, the uniform rate requirement applies on a franchise, not system-wide, basis. Moreover, an operator may face competition in one portion of its system, but not others. Its ability to respond to that competition should not be hampered merely because it may not face similar competitive circumstances elsewhere on its system.

66/ See generally Report and Order and Second Further Notice of Proposed Rule Making, 6 FCC Rcd 4545, 4553 (1991) (expressing Commission's intent to exercise its legal authority to obtain the information necessary from multichannel providers when a franchising authority or cable operator is unable to obtain estimates from competitors).

3. <u>Filing of Franchising Authority Certification</u>

Appendix D to the Notice contains a proposed form to be submitted by a franchising authority seeking certification to regulate rates. While we do not object to the use of a simplified form for submission by franchising authorities, more specific information may be necessary in order to evaluate whether a franchising authority in fact is capable of regulating in a manner envisioned by Congress.[67/] This is particularly true given the Act's 30 day time frame for evaluating certifications. Merely asking franchising authorities to check boxes indicating whether they have the legal authority, appropriate regulations, and adequate personnel, to regulate rates may not provide enough information to meaningfully determine whether that is in fact the case. At a minimum, regardless of the approach the Commission ultimately establishes, it should require franchising authorities to set forth in detail the source of their authority to regulate.[68/]

67/ Cable operators, who have first-hand experience dealing with the franchising authority, would be in a position to assist the Commission in evaluating whether that franchising authority could in fact qualify for certification. Operators, therefore, should be served with this certification request and should have an opportunity to challenge this certification, both as part of the 30 day review process and on reconsideration.

68/ And if the Commission should adopt a regulatory framework other than a benchmark approach, it may well be necessary to obtain specific information on the number and background of the personnel responsible for administering the regulation of basic service rates.

The Commission's regulations should make clear that this legal authority derives from state or local law, and is not independently conferred by the Cable Act. Section 623(a)(3)(B) specifically requires a franchising authority to have legal authority to adopt regulations with respect to rates. In the face of this requirement, Congress could not have intended by the Cable Act to grant such authority to municipalities, regardless of state law or their local franchise. To find otherwise would require a construction that would render Section 623(a)(3)(B) superfluous. Moreover, such an interpretation would also conflict with the well-established principle that a municipality derives its authority from the state in its capacity as sovereign.[69/]

Finally, the Commission suggests that two or more communities could file a joint certification, and seeks comments on whether to provide incentives for, or even require, such filings.[70/] While the House Report indicates that joint filing was not intended to be prohibited, it also makes clear that joint

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69/ See, e.g., Dillon, Municipal Corporations, Section 237(89) (5th ed. 1911) ("Dillon's Rule"). This is not to say that the Commission may not have its own authority to regulate basic service rates where a franchising authority's certification request has been rejected because of the franchising authority's lack of legal authority to regulate rates. See Section 623(a)(6). But that does not mean that the Commission can turn around and delegate that legal authority to franchising authorities where that authority has not been conferred by the state.

70/ Notice, para. 21.

filing should not be required.[71/] Therefore, the Commission should certainly not mandate joint filings. At most, the Commission's rules can clarify that joint filings may be made if franchising authorities so desire.

4. Revocation of Certification

In requiring FCC review of a franchising authority's certification request, and in prescribing circumstances in which the FCC can act to revoke that certification, Congress made clear its desire that basic rate regulation be applied in a consistent and competent manner. If a franchising authority has failed to comply with the Commission's rate regulation rules,[72/] or if it lacks the personnel to carry out its duties in a manner intended by Congress, we submit the remedy should be the same -- certification should be revoked, and the Commission should step in to regulate until the franchising authority is able to come into compliance with the rules.

71/ House Report at 80-81.

72/ The Commission asks whether the 1992 Cable Act "effectively preempt[s] state or local laws, e.g., concerning the methodology of rate regulation, that may conflict with the rules that we establish". Notice, para. 26. The answer is certainly yes. The Act is quite clear that in order to be certified, a franchising authority "will adopt and administer regulations with respect to rates subject to regulation ... that are consistent with the regulations prescribed by the Commission." Section 623(a)(3)(A). Congress also expressly preempted any state regulation of rates other than as provided in the Act. Section 623(a)(1).

The Commission also proposes that a system operating in an area once not subject to effective competition, that later faces such competition, should petition the franchising authority for a change in its regulatory status.[73/] If the Commission is not inclined to make this finding itself, it is critical that it ensure that franchising authority review is expedited. Thus, a franchising authority should be required to render its decision within a brief period of time, such as within 30 days after submission of an operator's petition. A FCC decision ratifying the franchising authority's finding -- a matter that should not be controversial, since both the operator and franchising authority would be in agreement -- should also occur within an expedited time frame of 15 days after receipt of notification of a franchising authority's decision that effective competition exists. As the Commission previously stated in connection with its redefinition of effective competition, "once a cable system is found to face effective competition, there is neither a need nor the legal authority upon which to continue regulation of its rates."[74/] Therefore, once a determination is made by the Commission that effective competition is present, rate regulation must cease immediately.

By the same token, operators whose petitions have been denied should obtain expedited review by the Commission. While

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73/ Notice, para. 28.

74/ Report and Order, 6 FCC Rcd at 4562.

Section 1.45 outlines the schedule for filing pleadings, it does not contain any timetable for Commission action. We would suggest that any Commission determination take place within 30 days of the completion of the pleading cycle.

B. Procedures for Basic Rate Regulation

The Notice raises many issues about the proper procedure for instituting rate regulation of systems not subject to effective competition. Many of the difficult issues raised by the Commission can more easily be resolved if a benchmark approach is adopted.

1. Timetable for Action by Franchising Authority

As the Commission recognizes, a deadline that allows for the expeditious consideration by a franchising authority of operators' existing basic service rates, and any subsequent proposed rate increases, is critical: "without such a deadline, a franchising authority could by inaction delay new services reaching the public and deny a reasonable price change which could be critical to an an operator's ability to serve the community."[75/] The Notice seeks comment on the appropriate timetable for action by franchising authorities.

For existing rates, the Commission proposes that an operator, after receiving notice from a franchising authority that it has been certified, file its schedule of basic tier

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75/ Notice, para. 80.

rates. After a brief period of time, the rates would be presumed reasonable absent a negative finding. While the Notice suggests a 120 day period for review of existing rates, that time frame is entirely too long and would only frustrate operator's ability to move ahead with providing new services.

This is particularly the case where rate increases are proposed. The statute provides that operators must give franchising authorities 30 days' advance notice of proposed increases in basic service rates.[76/] We propose that the Commission's rules provide that a franchising authority must grant or deny the rate increase within that period. If the Commission adopts a benchmark approach, a franchising authority would face no difficulty in complying with this deadline. If a rate, after the proposed increase, is below the benchmark, it automatically should be permitted to go into effect at the end of the 30 day period and no formal hearing would be necessary. If the new rate would be above the benchmark, the burden would be on the operator to present evidence along with its proposed rate increase justifying that increase. But if a franchising authority did not act within the 30 day period, the increase should be able to go into effect, subject to a franchising authority's ability to order a rollback should it subsequently determine that the rate is not reasonable.

76/ Section 623(b)(6).

A determination that a basic service rate is not reasonable should be appealable to the Commission. As the Notice points out, "this approach might assure a more uniform interpretation of the standards and procedures adopted pursuant to the Cable Act."77/ A local court, in contrast, would have no expertise to evaluate whether or not a particular rate was justified.

C. Complaint Procedure for Cable Programming Service

As with basic service, the appropriate procedures for establishing the unreasonableness of a rate for cable programming service hinges on the type of rate regulatory approach adopted by the Commission. If, as we suggest, the Commission were to establish a rule that looks to define a range of rates, that is not "unreasonable" then the consideration of complaints would be much more straightforward than if a cost-of-service approach were adopted. But regardless of the method adopted by the Commission, certain threshold requirements must be established and strict deadlines adhered to in order to avoid overwhelming operators and the Commission each time subscribers are notified of a rate increase (or during the 180 days after the rules go into effect).78/

77/ Notice, para. 87.

78/ Congress provided that complaints based on a change in rates should be filed "within a reasonable period of time" following the change. Section 623(c)(3). The Commission proposes that complaints must be filed within 30 days after a subscriber receives notice of the rate change. Notice, para. 105. No extension of this filing period should be

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Congress did not believe that the vast majority of existing rates were "unreasonable". Yet, unless some mechanism is adopted for screening complaints, even system operators with "reasonable" rates may well face millions of complaints from subscribers. We would therefore suggest that (assuming that the Commission adopts a range of reasonableness approach to cable program service rates), a threshold showing that an operator's rate is outside that range would be necessary.

A subscriber complaint should be required to state facts showing the rate is above the benchmark, show that the complainant is a subscriber to the system, describe the level of service the complainant receives, and present information about the rate. A complainant would be required to serve notice on the system.

We recognize, however, that subscribers may not have access to information enabling them to determine in the first instance whether a rate falls within the range of reasonableness. In order to reduce the burden on Commission staff, one alternative, as the Notice suggests, could be to require complainants first to present their complaint to a franchising authority.[79/] The franchising authority could seek from the operator its benchmark

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granted. Otherwise, continuing uncertainty over whether a rate increase could go forward would seriously impair system operations.

79/ Notice, para. 52.

and evaluate the complaint to determine whether the rate is presumptively "unreasonable." If so, it could be forwarded on to the Commission. Once the Commission determines the complainant to have met the minimum threshold, an operator would have the opportunity to demonstrate that its rates are not unreasonable. But if an operator's rates fall below the benchmark, an operator would not be required to respond to the complaint and the complaint should be automatically dismissed.

Assuming that the Commission determines that an operator's existing rate for cable programming service is unreasonable, we agree with the Commission's determination [80/] that refunds cannot be ordered for rates in effect prior to the effective date of the Commission's rules. Section 623(c)(1)(c) provides the FCC authority to order refunds in only one instance: where rates or charges are determined to be unreasonable, the Commission can order the refund of "such portion of the rates or charges that <u>were paid by subscribers after the filing of such complaint."</u> There is no authority in the Act for ordering refunds prior to the filing of a complaint -- a filing as to existing rates that can only take place during the "180 day period <u>following the</u> effective date of the regulations established by the Commission..." Section 623(c)(3)(emphasis added).

The Commission proposes, in cases where it determines rates to be unreasonable, that it require operators to make reductions

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80/ <u>Id</u>., para. 105.

within 30 days of a decision finding existing rates unreasonable.[81/] While the Commission suggests that it may order systems to issue refunds to subscribers, it may well be administratively difficult for operators to keep track of previous subscribers. This would be especially difficult if a proceeding to determine whether an operator's rate was unreasonable took place over an extended period of time. Therefore, it would be far preferable from an administrative standpoint to order a pro rata reduction over time to the class of subscribers existing at the time a determination is made that purchased the service for which the rate was determined to be unreasonable.

Moreover, in lieu of requiring prospective rate reductions, an operator should be permitted to reconfigure its tiers to reach the benchmark level.

V. Miscellaneous Rate Regulation Issues

A. Uniform Rate Structure

Section 623(d) of the Cable Act requires operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Commission tentatively concludes that operators may establish reasonable service categories with separate rates and service terms and

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81/ Id., para. 107.

conditions.[82/] We would agree that separate rates relating to different categories of service are permissible under the Act. An operator, for example, could charge a rate different for bulk sales than for service to an individual subscriber without violating this provision so long as the differing rates are uniformly applied throughout a geographic area -- an area that constitutes the franchise area.

That the franchise area is the proper boundary of the "geographic area" is clearly supported by a review of the legislative history. The Senate Report explains that this provision "is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[83/] Congress's clear intent was that this requirement would apply on a franchise-by-franchise basis.

And it makes sense to interpret the uniform rate requirement in this fashion. An operator of a single system serving multiple franchise areas may be subject to differing requirements in those

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82/ Id., para. 113.

83/ Senate Report at 761 (emphasis added). See also 138 Cong. Rec. S.14248 (Sept. 21, 1992) (statement of Senator Gorton) (explaining that this provision was intended to forbid a system "from offering different prices within a franchise area in order to drive out competition where it exists only to later reraise their rate when their competitor is driven out of business.")

franchises. These differing obligations and costs may be reflected in different rates to subscribers in separate franchise areas. If the Commission were to adopt rules that applied system-wide, an operator would unfairly be required to spread those franchise costs to all subscribers of its system. But no reason has been suggested as to why Congress would have intended this result.

Interpreting Section 623(d) to apply on a franchise-by-franchise basis does not make Section 623(e) -- which enables a franchising authority to prohibit discrimination among subscribers and potential subscribers, except with respect to reasonable discounts to senior citizens and other economically disadvantaged groups -- duplicative, as the Notice suggests. The discrimination provision does not address differences in rates charged to similarly situated categories of subscribers within a geographic region. Rather, it is aimed at a different concern -- that is, allowing franchising authorities, if they choose, to prohibit discrimination by cable systems in providing or failing to provide service to particular groups of subscribers within a franchise area based on, for example, the sex, race, age, or disability of those subscribers. The fact that Congress specifically allows discrimination in favor of senior citizens is a clear indication of this intent.

B. Negative Option Billing

The Commission also seeks guidance on the proper interpretation of the reach of the negative option prohibition in

Section 623(f). This provision can best be read to mean that where a service tier or item of equipment is optional, and where a subscriber is not already taking this service, a subscriber cannot be forced to purchase it without affirmatively requesting it. It should not be read to apply to system-wide offerings where a subscriber would not have the choice of refusing to obtain a particular program, tier or equipment.

Therefore, as the Conference Report makes plain, a change in the mix of a programming tier[84/] should not be considered a negative option prohibited by the Act. Nor should, as the Commission recognizes, a system-wide upgrade in equipment, even when accompanied by a price increase. In none of these cases would a subscriber have a choice, in advance, of whether to take a particular service, tier or item of equipment. A subscriber simply cannot choose to subscribe to a tier and opt out of obtaining a particular program service on that tier.

Operators must be able to engage freely in system-wide equipment changes or in modifications to a bundled group of services without being held hostage to the whims of a single subscriber. But if such a change were viewed as a "negative option", the ability of operators to introduce new services would come to a halt. That cannot be what Congress intended.

84/ See Conference Report at 65. ("The provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service.)

The Commission also asks whether changes in the basic service tier made to accommodate implementation of rate regulation -- in which a single basic tier would be split into a smaller basic and expanded basic tiers -- would constitute a negative option. It would not. The level of service -- viewed as a whole -- has not changed, and a subscriber has already "affirmatively requested" this level of service. Indeed, the answer would be the same even if new services were added to one programming tier for the reasons described above.

C. Evasions

As described earlier, the ability of operators to retier or repackage their program offerings is not constrained by the Act. Futhermore, Section 623 is concerned with the rates for service -- and not with the qualitative nature of those service offerings. Indeed, it is not the Commission's (or franchising authorities') province to judge whether a particular service is qualitatively better or worse than a service previously provided in a particular tier of service -- rather, the concern in the Act is whether the rate for a particular package of service offerings is "unreasonable".

The question of whether a cable operator has taken measures to "evade" rate regulation, then, must be seen as an attempt to allow the Commission to reach implicit rate increases that may result from retiering where no increase in rates *per se* has taken place -- such as where a system currently offering a 20 channel basic service for $20 moves 10 of those channels from its basic service to a tier and still charges $20 for its 10-channel basic service. But if the Commission adopts a benchmark approach to rate regulation, then there is no need to adopt additional rules to prevent "evasions".

The reasonableness of the $20 rate for a 10 channel tier would be judged against that benchmark, and no "evasion" of rate regulation will occur. Therefore, if an operator were to reduce the number of channels on a tier, while not reducing its price, that reduction could still be viewed as a rate increase triggering franchising authority or Commission review upon complaint. But retiering, as the Commission recognizes, is not itself an evasion: "retiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion."[85/] It is, thus, critical that the Commission clarify the narrow meaning of "evasions" not to cover retiering or rearranging of program services, but to cover certain implicit rate increases.

D. Collection of Information

Section 623(g) provides that the Commission shall require operators to file "such financial information as may be needed for purposes of administering and enforcing this section." The

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85/ Notice, para. 127.

Notice, in Appendix C, contains a draft form that could be used to satisfy this requirement.

This detailed form, containing 75 separate categories of requested data, appears designed to collect information relating to a cost-of-service approach -- an approach, we submit, that should not be adopted by the Commission. If the FCC should adopt our preferred approach -- use of a benchmark -- there is no need for imposing this detailed reporting burden on operators. Instead, the Commission could use a modified survey form in order to derive the benchmark. More detailed records of costs that may be necessary to demonstrate the reasonableness of rates above the benchmark would be made part of an operator's case in support of its rate. But there would be no need routinely to obtain this information from all operators.

E. Small System Burdens

The Act requires the Commission to develop and prescribe cable rate regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.[86/] It is critical that the new rate regulatory regime not impose undue burdens on these system -- burdens that will drive up costs and rates to subscribers.

In part, the benchmark process that we have described should help alleviate administrative burdens on all systems, both large and small. But in cases where a system serving fewer than 1,000 subscribers has rates above the benchmark, the Commission should

86/ Section 623(i).

look for ways to simplify cost-based proceedings. One method of doing so, as the Notice suggests, would be to establish a presumption that such systems' rates are nonetheless reasonable, and to shift the burden of proof to franchising authorties to demonstrate that the system's rates are unreasonably high.[87/]

The Commission should not, however, distinguish between small systems based on whether the system is independnt or MSO-owned. Given the decentralized nature of the cable industry, it makes little sense to presume that the ownership of a small system automatically would make compliance with the rate regulation rules and procedures easier.[88/]

VI. LEASED COMMERCIAL ACCESS

Section 9 of the Act amends 612 of the Communications Act, 47 U.S.C. Section 532 -- the provision requiring cable operators to set aside channels for leased commercial access. Under the amended terms of Section 612, the Commission is required to determine maximum rates to be charged by systems for leased access, to establish reasonable terms and conditions for such use, and to establish new procedures for expedited consideration of leased access disputes.

87/ Notice, para. 131.

88/ Moreover, as the Notice points out, the Commission has established exemptions for small systems from many of its regulatory requirements. None of these exemptions look toward the ownership of the system -- it only is based on system size.

The amendments reflect Congress's understanding that use of leased access channels has been relatively rare and its concern that this may be the result of unreasonable terms imposed by cable operators and unduly burdensome procedural requirements for challenging such terms:

> [T]he Committee believes that leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or to cable subscribers. In the Committee's view, the principal reason for this deficiency is that the Cable Act empowered cable operators to establish the price and conditions for use of leased access channels. The House Report that accompanied the Cable Act explicitly states that the Act does not require cable operators to provide leased access channels on a non-discriminatory basis, noting that the fair market price will vary with the content of the service. <u>The FCC stated in the FCC Cable Report, however, that some cable operators have established unreasonable terms, or in some cases, simply refused to discuss the issue of leased access with potential lessees.</u>[89/]

In fact, the Commission made no such finding, nor is there any substantial evidence that operators are insisting on unreasonable terms or rates for leased access. In its 1990 Cable Report, the Commission noted that "[f]ew commenters provided information or argument"[90/] regarding usage of leased access or the need for changes in the Act's substantive or procedural requirements. The Commission did report that the joint comments of New York City and the National League of Cities and the

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89/ House Report at 39 (emphasis added).

90/ <u>Report</u>, MM Docket No. 89-600, 67 R.R. 2d 1771, 1811 (1990).

comments of the State of Hawaii had "suggest[ed] that the implementation of leased access had been frustrated because cable operators have established unreasonable terms, or in some cases, simply refused to discuss the issue.[91/] But there was no evidence that this had been the case, and no indication, anywhere, that leased access rates have been set too high. All that the Commission concluded was that "the current enforcement provisions of Section 612 are too cumbersome"[92/] and should be standardized.

Establishing new procedures could make it less burdensome for potential lessees to demonstrate, on a case-by-case basis, that the rates, terms and conditions established by a cable operator were unreasonable. But the leased access framework established in the Act is not readily susceptible to a "benchmark" approach that identifies a maximum rate applicable to all systems in all circumstances. Any particular system's "reasonable" rate for leased access depends upon the other services that it carries on its system, the terms of such carriage, and the type of programming service that the potential lessee intends to provide.

91/ Id. (emphasis added).

92/ Id. at 1812.

This is because future Section 612 does not seek to eliminate the cable operator's function of selecting and packaging programming for sale to subscribers and to instead require systems to operate in a leased access mode. To the contrary, Congress intended to preserve the traditional editorial and packaging functions of cable operators, while crafting a leased access mechanism that could co-exist with those functions. Thus, Section 612, as the House Report indicates, does not require non-discriminatory rates -- i.e., a single rate for all lessees. Indeed, it specifically permits cable operators to set different rates depending on the content of the programming, in order to establish rates "which are at least sufficient to assume that such use [by leased access programmer] will not adversely affect the operation, financial condition, or market development of the cable system."[93/]

The interrelationship between the package of programming selected and offered by cable operators to their subscribers and the programming provided on leased access channels means that any rate ceiling for leased access channels must be determined on a system-by-system basis. And it must be based not simply on the operator's costs of providing the leased access channel but also on the effects of the channel on the operator's own program packages and offerings.

93/ 47 U.S.C. Section 532(c)(1).

The Commission's proposed approaches do not meet these requirements. A "cost-of-service" approach[94/] would focus solely on the operator's costs, with no regard to the different effects that different leased access programming might have on existing services. As previously discussed, cost-of-service ratemaking is, in any event, a particularly undesirable approach to cable television regulation. Even apart from its generic complexity and burdensomeness, cost-of-service regulation cannot work unless there is some uniform and accessible method of determining costs. And no such uniform accounting system is currently in use. But even if cost of service regulation were feasible, its exclusive focus on costs would not produce the appropriate rate ceilings for leased access.

A benchmark "based on typical system costs"[95/] would share the flaws of a cost-of-service approach and would, in addition, ignore the critical differences among cable systems. It, too, would focus exclusively on operators' costs of providing leased access channels -- but it would attempt to determine average or "ideal" system costs, setting a single benchmark for all systems.

In order to take into account the effects of a leased access channel on a system's operations, it is necessary to take into account the manner in which cable systems assemble their own packages of programming. In assembling such packages, operators

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94/ <u>See</u> Notice, para. 149.

95/ <u>Id</u>., para. 148.

virtually never negotiate identical terms and prices for all program services. Operators pay different amounts for different services, and these differences are based on the different operating costs of such services, the different demand for such services among consumers, and the different value that each service brings to the tier or package of services provided by the operator. In reselling such services to subscribers, the operator must establish prices that cover its costs plus a reasonable profit. And the prices at which individual services are purchased are not uniform, nor are the prices at which they are resold.

While cable operators typically pay programmers for their services and then resell those services to consumers, those relationships could be conceptualized as "lease" arrangements. Suppose, for example, that a cable operator pays a premium movie service five dollars per subscriber for its service and resells the service to subscribers for nine dollars. This is, in effect, the same as if the movie service "leased" the channel for four dollars and resold it itself for nine dollars. The implicit leased access charge in such an arrangement is four dollars.

The implicit leased access charge for other services will be different. Premium services that can be resold for several dollars more than their cost will obviously have a higher implicit leased access charge than basic services that produce less revenue per-channel. By effectively charging different access "rates" to different programmers -- so long as the <u>overall</u> revenues from all services cover costs plus a reasonable profit